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No. 373

IN THE

Supreme Court of the United States

October Term, 1958

CAMERON IRON WORKS, INC., *Petitioner*

v.

LODGE NO. 12, DISTRICT NO. 37,
INTERNATIONAL ASSOCIATION OF MACHINISTS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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SUBJECT INDEX

	PAGE
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	8
ARGUMENT	8
COUNTER-POINT I	15
COUNTER-POINT II	24
COUNTER-POINT III	26
COUNTER-POINT IV	27
CONCLUSION	32

LIST OF AUTHORITIES

CASES	PAGE
Association of Machinists v. Gonzales, 78 S. Ct. 923, 925	11
Association of Westinghouse Salaried Employees v. Westinghouse Electric Co., 348 U.S. 437	8, 17
Garner v. The Teamsters Union, 346 U.S. 485	8
General Electric Co. v. Local 205, etc., 353 U.S. 547	6
Guss v. Utah Labor Relations Board, 353 U.S. 1	8
Hoover Motor Express Co. v. Teamsters Union, 217 F. 2d 49	14
Independent Petroleum Workers of N.J. v. Esso Standard Oil Co., 235 F. 2d 401 (C.A. 3, 1956)	16
International Union, United Automobile Workers v. Benton Harbor Malleagble Industries, 242 F. 2d 536, cert. den., 355 U.S. 814	14
Local 149 of American Federation of Technical Engineers (AFL) v. General Electric Co., 250 F. 2d 922, cert. den., 356 U.S. 938	13, 24, 25
Local 1976, United Broth. of Carpenters v. NLRB, 78 S. Ct. 1011	10
NLRB v. Lion Oil Co., 352 U.S. 282, 77 S. Ct. 330, 1 L. Ed. 2d 331 (1957)	4
Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955)	10, 21
Textile Workers v. Arista Mills Co., 193 F. 2d 529 (C.A. 4, 1951)	15, 17
Textile Workers, etc. v. Lincoln Mills of Alabama, 353 U.S. 448	8, 9, 11, 22, 31
United Electrical, etc., Local 259 v. Worthington Corp., 236 F. 2d 364 (C.A. 1, 1956)	19

UNITED STATES STATUTES	
29 U.S.C.A. 173(d)	11
29 U.S.C.A. 187	9

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The sole respondent, Lodge No. 12, District No. 37, International Association of Machinists, a local union, herewith submits its brief in opposition to the grant of certiorari.

Subject to some matters noted below, we accept Petitioner's preliminary statement and statement of jurisdictional requisites. The Opinion of the Court of Appeals is now reported at 257 F. 2d 467.

Questions Presented

We accept the three tendered questions as stated by petitioner with this important caveat: Petitioner often uses the phrase, "admitted jurisdiction" of the National Labor Relations Board. Respondent reminds that Congress considered, and expressly rejected, the idea of making breach of a collective bargaining agreement an unfair labor practice. Congress deliberately concluded to place contract enforcement in the federal district courts and not in the Board.

A fourth question now tendered by Respondent is as follows:

Since the contract in question provides that any difference as to the meaning, application or interpretation of the provisions of the agreement shall be referred to the final and binding decision of a board of arbitrators, should the Court below have held that the question of arbitrability was for the arbitrator rather than for the court itself?

As the opinion below reflects, it was Respondent's first point on the appeal below that arbitrability was for the arbitrators to decide. This was not sustained by the Court. The Court sustained Respondent's second, and alternative, point that, in any event, the District Court misconstrued the contract. The Court of Appeals held that the discharges in question were arbitrable under the contract language and therefore reversed and remanded.

The above question is interwoven with Petitioner's three points. Respondent urges an affirmative answer to this fourth question as an alternative ground in support of the judgment of the Court of Appeals. We contend, in sub-

stance, that ti Court should have reached the same result but by a different route.

However, Respondent presents this additional question strictly on a contingent basis and does not wish to be understood as encouraging the grant of certiorari. In the interest of the 15 employees, we prefer the prompt return of the case to the District Court where the unduly withheld order to arbitrate may again be sought. We believe denial of certiorari is appropriate here for the reasons hereafter stated.

Statement of the Case

Supplementing Petitioner's statement, and at points correcting, we submit the following facts:

The collective bargaining contract in Article XX, its "Termination Clause," (Contract, p. 32) provides:

> "SECTION I. This agreement shall become effective as of June 1, 1956, and *remain in effect* through May 31, 1958, and thereafter from year to year subject to 60 days' written notice before the expiration of any yearly period (after the first two (2) years) of a desire by either the Union or the Company to amend, change, or terminate this agreement." (Emphasis added.)

The phrase "remain in effect" is clear enough language that the contract was not suspended or terminated during the strike which occurred during its term (April-June, 1957), the strike being authorized by the contract itself on the one question of wages by its wage reopening clause. Further, the quoted clause is repetitious that amendment, change

or termination can occur only "after the first two (2) years."[1]

Section 2 of the same Article XX (Contract, p. 32), the wage reopening clause, provides that the question of wages may be reopened during the term of the agreement one time during any contract year and if the negotiations fail to produte wage rate modifications after 60 days' notice "any limitation on the right of the Union to strike established by the terms expressed or implied by this agreement shall terminate on or after . . ." the 60th day.

The validity and beneficial purpose of the wage reopening clause has been fully recognized in *National Labor Relations Board v. Lion Oil Company*, 352 U.S. 282, 77 S. Ct. 330, 1 L. Ed. 2d 331 (1957). As there pointed out, this device enables parties in the industrial world to develop long-term bargaining relationships which in turn make for stability. Under its specific language, this contract did not terminate during the strike on wages but remained in full force and effect. The possible issues were thus contractually confined in advance, enabling them to be the more easily settled. During the contract term, if the employees should strike on an issue other than wages, for example, to obtain better vacations or to improve their hours of work, they would violate the no-strike clause of the contract. Furthermore, because of this contractual confinement of the issues in advance, if either party gained the upper hand in the economic contest over wages, it could not take advantage

[1] The contract in the form of a printed booklet is attached to the Transcript and is duly certified by the Clerk below as a part of the record as it was made up in the Court of Appeals. References to the booklet are clearly identified here thus: "Contract, p.———."

of the situation to make other demands for changes in the contract since these are prohibited for a period of two years. This is the basic fact with which Petitioner seems unable to come to grips, for throughout the Petition recurs the suggestion that the collective bargaining agreement "is silent on, and contains no provision whatever governing the actions and conduct of Petitioner, Respondent, or the employees during the course of a strike such as the one of the Respondent called under the wage reopening provision." (Petition, pp. 7-8.)

Beginning with a preamble which recites its purpose to promote, improve and maintain "industrial economic and harmonious relations between the Union and the Company," the contract provides, among other things, for the arbitration of grievances (Contract, pp. 4-8), including specifically discharge grievances (Contract, p. 4), the procedure of which follows the normal arbitration system. These clauses are supplemented by another proviso, Article XII, Section 13 (Contract, p. 20), which requires that a discharged employee be given the cause of discharge in writing within 36 hours of discharge. In addition, Article XIV, entitled "Seniority" (Contract, pp. 23-28), creates an elaborate system of plant and classification seniority specifying the order of promotion, layoff, down-grading, and restoration to service. (Contract, p. 25)

The contract also provides for the maintenance of a retirement program for the benefit of the employees (Contract, p. 33), sick leave provisions (Contract, pp. 28-30), vacations (Contract, p. 2, *et seq.*), and other contractual rights of a valuable substantive nature.

The management rights clause, Article XII, Section 3 (Contract, p. 17), reads as follows:

> "The management of the plant and the direction of the working forces, including but not limited to, the selection of employees; the scheduling and assignment of work, the right to hire, discipline, suspend, discharge, transfer, relieve employees from duty because of lack of work, or for other legitimate reasons, and all other rights not herein expressly relinquished are vested exclusively in the Company. This authority will not be used for purposes of discrimination."

This clause contains limitations. The company must act for legitimate reason; it must not discriminate; its rights are subject to all other adverse rights "expressly relinquished" in the contract.

We have here, therefore, a traditional case of a discharge grievance, wherein the Union seeks by arbitration (1) to review and set aside discharges claimed to be unjust and in violation of the contract, and (2) to restore these employees to their contractual rights of seniority, retirement, etc. A suit to compel arbitration of discharge is a Section 301 case as has been settled *General Electric Co. v. Local* 205, etc. 353 U. S. 547. The single complication which Petitioner raises is the fact that the terminations occurred following the settlement of the strike, enabling the company to tender a defense of misconduct during the strike which in turn is said by Petitioner to oust the Board of Arbitration of all its function in the matter.

The complaint (Tr. 5-13) nowhere alleges that the company violated the National Labor Relations Act or that any remedy should be granted on account of the Act.

The complaint alleges that there is a contractual right to arbitrate the discharges under the contract (Tr. 6), that the Union and the employees submitted their written grievances "claiming in substance that they were unjustly discharged and requesting reinstatement with all rights unimpaired and with pay for all time lost" (Tr. 7), and that the Court should mandatorily order petitioner to arbitrate (Tr. 9-10). The only alleged duty was stated thus: "Defendant is under contractual duty to entertain said grievances and submit the cause to arbitration as made and provided by the collective bargaining contract, but has failed and refused to do so" (Tr. 9).

Reasons For Denying The Writ

1. There is only remote analogy between the preemption argument here raised by Petitioner and the problem of state versus federal jurisdiction, under *Garner v. The Teamsters Union*, 346 U. S. 485, and succeeding cases through *Guss v. Utah Labor Relations Board*, 353 U. S. 1. Those decisions, and related cases, were concerned with the delegation to the National Labor Relations Board of jurisdiction to correct and prevent unfair labor practices under Section 10 (a) of the Act. Here the situation is the opposite. As the Court noted in the *Westinghouse* case,[2] 348 U. S. at 443, in footnote 2:

> ". . . It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' H. R. Conf. Rep. No. 510, 80th Cong., 1 Secs. 42. . ."

And, again, in *Lincoln Mills*,[3] 353 U. S. at p. 452, the Court quoted the same legislative history and again noted the important fact that although a refusal to abide a collective bargaining contract was originally declared to be an unfair labor practice in the bill, this feature was dropped in conference committee in favor of enforcement in the federal courts.

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[2] Association of Westinghouse Salaried Employees v. Westinghouse Electric Co., 348 U.S. 437.

[3] Textile Workers, etc. v. Lincoln Mills of Alabama, 353 U.S. 448.

2. Since determination of preemption *vel non* is a question of divining the legislative intent, such a crisp legislative history leaves little cause to imagine that the specifically provided machinery to enforce collective bargaining contracts in federal district courts should be paralyzed because of an imagined impingement on the exclusive area of the Board's function. In some ways this instance resembles Section 303 of the Act, 29 USCA Sec. 187, where Congress because of special considerations provided a federal action for damages sustained from commission of one of the unfair labor practices, the secondary boycott. Here Congress from other, but quite special, considerations created a federal court action, and entrusted it to the federal court "and not to the National Labor Relations Board."

3. The collective bargaining contract is the avowed end-product sought by Congress in enacting the statute and, if lawful, its enforcement is a matter of highest public policy as the means to remove obstructions to commerce. ". . . The Congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear . . ." this Court has held there is no reason to submit them to the inapposite requirements of Section 7 of the Norris-LaGuardia Act. *Lincoln Mills, supra,* 353 U. S. at 458-459. Likewise, we submit, the same Congressional policy renders it incongruous to forestall simple contract enforcement of a discharge grievance on grounds of preemption unless there is some actual conflict or confusion beyond that conjured in abstract debate.

4. No conflict or confusion is discernible from the decision below. Nor has any difficulty developed in the cases thus far. The several Courts of Appeals have approached the matter cautiously, to be sure, but in several well thought

out decisions, the harmonious conclusion has been reached that at least the essential substantive rights of collective bargaining contracts should be enforced according to the contract bargain. Thus the *quid pro quo* has been preserved to the contracting parties. The cases are discussed in our Argument Point I.

5. The National Labor Relations Board has not been given, nor has it claimed, authority to enforce these contracts or guarantee the delivery of the consideration promised by one party to the other. Neither has the Board exercised plenary power to interpret contract language except in so far as an agreement may be itself a violation of the statute, or an instrument of violation, or may be urged as a defense to an unfair labor practice charge. ". . . the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." *Local 1976, United Broth. of Carpenters v. N.L.R.B.*, 78 S. Ct. 1011.

6. The Board itself has in proper cases deferred to arbitration awards, or available arbitration procedures, to serve "the desirable objective of encouraging the voluntary settlement of labor disputes." *Spieberg Manufacturing Co.*, 112 N.L.R.B. 1080, 36 LRRM 1152 (1955), is a definitive opinion and policy statement by the Board which is discussed hereafter at p. 21.

7. The difficulties envisioned by Petitioner are not here. As the Court of Appeals held, submission of this discharge case to arbitration does not "affect" the Board's power to proceed, if the Board is so disposed, and thus Section 10 (a) is not violated. Indeed, the section contemplates that

"other means of adjustment or prevention" may exist.[1] The prohibition is against affecting the Board's power thereby. In the future, if the Board should proceed in a case already arbitrated and should reach a result contrary to an arbitration award, then that is the time a problem of accommodation might arise for decision through normal enforcement or review proceedings. But to arrest court enforcement of arbitration *in limine* because of some "argumentative coincidence in the facts adducible," *Association of Machinists v. Gonzales*, 78 S. Ct. 923, 925, which might, or might not, arise is to shy from a remote possibility of conflict when the policy of the law is to enforce the contract. The statutory scheme is not observed by such an approach. The effect on these labor contracts would be ruinous, for nearly every contract violation can present to the imaginative a lurking coincidence of evidence bearing upon an unfair labor practice charge. Certainly this is true of every discharge case.

8. And, unlike the hazards of disturbance or conflict which may result from the application of state law (which may intrude different, tangential or even hostile policy), here we have federal court interpretation and enforcement firmly anchored to the same statute and policies. Under the doctrine of *Lincoln-Mills*, ". . . federal interpretation of the federal law will govern, not state law." 355 U. S.

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[1] The phrase "other means of adjustment or prevention" in Section 10(a) can be read with little noticed Section 203(d), 29 U.S.C.A. Section 173(d) which contains a directive to the Federal Mediation and Conciliation Service:

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

at p. 357. The federal law which the court must apply must be fashioned from the policy of our national labor laws. ". . . The Labor Management Relations Act expressly furnishes some substantive law . . . other problems will lie in the penumbra of expressed statutory mandates. Some . . . will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." 353 U. S. at 357. No doubt, the federal courts must be mindful of interpretations by the Board itself as a part of a proper concern for a harmonious result. This approach has already been adopted in the decision below and in other cases which are discussed in our Argument. While Board procedures will remain paramount insofar as the exercise of its jurisdiction over unfair labor practices is concerned, federal courts under the mandate of Section 301 will nevertheless assure the performance of the collective bargains.

9. As a matter of fact, however, it must be borne in mind that the complaint in this case does not allege that an unfair labor practice was committed. The complaint alleges that there is a contractual right to review the discharges. In substance this means that the Union claims that there is no proper cause under the contract for the discharge, taking into account the employees' seniority, their qualification as employees, their past records, the allegations against them, and other related matters. The appropriate test is to be designed by the Board of Arbitration under the contract language, taking into account the particular wording of the seniority clause, the grievance and arbitration clauses, the management rights clause, and other related provisions of the contract. Due allowance may be made by the Board of Arbitration for past practices in discharge cases for the meaning of the contract language, past arbitration decisions in this plant, arbitra-

tion precedents elsewhere, and related matters. Included within the determination would be whether or not the Company treated any of the 15 employees in a discriminatory manner in violation of the proviso in the management rights clause. The remedy would include not merely reinstatement to a job, but restoration of seniority rights, retirement rights, and other valuable property incidents of the collective bargain. Thus the employees' contractually protected rights are different from and broader than the right not to be discharged for union activities or the liability to discharge for unprotected activities. It is entirely possible that an employer may discharge an employee upon grounds which would in no sense violate the Act but which would clearly violate the contract.

11. Turning to Petitioner's argument that the decision below holding the discharges arbitrable under the contract is in conflict with a decision of the First Circuit (Petition, pp. 11-12), we think the opposite is immediately apparent. The First Circuit case, *Local 149 of American Federation of Technical Engineers (AFL) v. General Electric Company*, 250 F. 2nd 922, cert. denied, 356 U. S. 938, is a case which did not involve discharge problems at all. The case involved a claim that four employees in the bargaining unit were performing work equivalent to that required by a higher job classification than that for which they were being paid. The court held that the contract contained no language, either specific or implied, "for the purpose of determining whether the duties performed by any particular employee entitled him to be classified in any particular grade." 250 F. 2d 930. It also appears from that opinion that the arbitration agreement there involved contained a listing of arbitrable matters and an exclusion of others. The Court below construed the decision of the

First Circuit to mean that a matter is not arbitrable where a listing of many arbitrable incidences impliedly excludes an unlisted matter (see footnote 9 of the Court's Opinion, Appendix to Petition, p. 8). In the case at bar, discharges are specifically referred to and covered by the grievance-arbitration machinery, which remained in effect because of other express language, so that the case is entirely different from the First Circuit decision.

12. Petitioner's final reason for seeking the writ is a claimed conflict with two decisions of the Sixth Circuit (Petition, p. 12). Petitioner reasons that since the question of wages is not arbitrable, discharges incident to a strike over wages must likewise be held non-arbitrable, otherwise there is a conflict with the two cited holdings[5] to the effect that a claimed breach of a non-strike clause is not subject to arbitration.

Petitioner's reasoning is difficult to follow. It was entirely competent for these parties to contract, if they saw fit, that the question of a wage increase would be settled on the economic front if necessary, but that all other provisions of the contract should remain in effect and not be disturbed. There is nothing inconsistent between these two conceptions. Indeed, it is merely a matter of where the parties decided to draw the line between the contract clauses which could not be disturbed and those which would be put up for bargaining and, if necessary, for contest. The two decisions of the Sixth Circuit hold that in a suit for breach of the no-strike clause, the Union could not limit the Company to redress by arbitration. Right or wrong, nothing in those decisions touches the present case.

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[5] **International Union, United Automobile Workers v. Benton Harbor Malleable Industries**, 242 F. 2d 536; cert. denied, 355 U.S. 814, and **Hoover Motor Express Co. v. Teamsters Union**, 217 F. 2d 49.

Argument

Counter-Point I.

The Court of Appeals' decision is correct and substantially in keeping with the views of the several Circuits as well as the National Labor Relations Board.

In our "Reasons for Denying the Writ," we have stated Respondent's views on the marked difference between the enforcement of the collective bargaining contract on the one hand, and the intrusion of alien doctrines into the scheme of the National Labor laws on the other. At this point, we summarize the decisions of several Circuits touching upon the present problem.

The first Court of Appeals decision appears to be a 1951 opinion by Judge Parker in *Textile Workers v. Arista Mills Co.*, 193 F. 2d 529 (C.A. 4, 1951). There a strike settlement agreement was executed providing for the reinstatement of certain striking employees. Claiming that the Company had violated the reinstatement agreement, the Union brought suit in federal court under Section 301 to fix the rights of the unreinstated strikers. The Company raised the same defensive preemption argument that is presented here, namely, that the matter was nothing more than the charge of an unfair labor practice over which the National Labor Relations Board is given exclusive jurisdiction. In overruling this defense, Judge Parker analyzed it thus (193 F. 2d at 533-534):

> ". . . We think it clear that parties may not by including provisions against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the National Labor Rela-

tions Board. *Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the Courts may not enforce them even though the breach of contract with regard thereto may constitute also an unfair labor practice within the meaning of the act.* As said by Chief Judge Jones in *Reed v. Fawick Airflex Co.*, D. C., 86 F. Supp. 822, 823-824: 'It is clear that this Court has no jurisdiction to entertain a petition for relief as to unfair labor practices. . .'

* * *

"If, however, a particular act is a subject of an agreement between employer and union and the union sues for breach of that contract, *the District Court could not be ousted of its jurisdiction* to hear and determine the case merely because the act constituted not only breach of contract but also an unfair labor practice."

* * *

"Our conclusion on the first question is that, while there was no jurisdiction in the court to grant relief with respect to any refusal to bargain, which, if established, would be an unfair labor practice within the exclusive jurisdiction of the Labor Board, . . . *the court did have jurisdiction to grant relief with respect to the alleged breaches of contract relating to refusal to accord to striking employees the status and rights to which they were entitled under the bargaining agreement.*" (Emphasis added.)

The next decision appears to be *Independent Petroleum Workers of N. J. v. Esso Standard Oil Company*, 235 F. 2d 401 (C.A. 3, 1956.) There the Union brought a Section 301 suit to compel an employer to abide by an express contractual commitment which required the Company to negotiate with the Union a salary rate for any new job classification established by the Company. The Company

defended on the ground that the Union's claim amounted to nothing more than a refusal to bargain (Section 8 (a) (5) of the Act) and that the case was subject to the exclusive jurisdiction of the National Labor Relations Board. In overruling the defendant's contention, and in ordering enforcement of the contract, the Court cited and followed Judge Parker's opinion in the *Arista Mills* case, *supra*, and several determinative Board decisions. Because this opinion of the Third Circuit contains a concise summary of Board policy pertaining to the matter, as well as the Court's reasoning, we take the liberty to quote it extensively. After noting the legislative history cited in footnote 2 of this Court's opinion in *Westinghouse*, to the effect that enforcement of collective bargaining contracts is for the Courts and not for the Board, the Third Circuit said (235 F. 2d 401-405):

> "That such jurisdiction belongs exclusively to the courts was held by the National Labor Relations Board in United Telephone Company of the West, 112 N.L.R.B. 799 (1955).
>
> "Said the Board, page 782:
>
> 'The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.'
>
> "The Board, citing prior rulings, stated (page 781):
>
> 'As the Board has held for many years, with the approval of the courts: "* * * it will effectuate the statutory policy * * * for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."'

"It is pertinent to note that in United Telephone Company of the West, supra, the union and employer gave conflicting interpretations to overtime provisions in their collective bargaining contract and when they were unable to agree the employer filed a suit for declaratory judgment. The union thereupon filed a Complaint with the Board charging unfair labor practices. The Trial Examiner in his Intermediate Report found against the employer. The latter filed exceptions to the Report contending that it had a right to submit the dispute as to the correct interpretation of their contract to the courts rather than to the Board. The Board agreed, stating (page 780):

> 'Inasmuch as the issue of the construction of the contract is now pending before a court of apparent jurisdiction no valid reason exists for the Board to enter this controversy.'"

* * *

"The defendant seeks to avoid the impact of the cases cited by insisting that its failure to negotiate on the salary rate for the new job classification as required by the collective bargaining contract is simply 'an unfair labor practice' as to which the National Labor Relations Board has exclusive jurisdiction.

"Otherwise stated, the defendant's position is that it has breached its contract, that it acted 'unfairly' in doing so, but willy-nilly, since the violation was a breach of a labor contract, that it is by virtue of that fact 'an unfair labor practice' and as such beyond the reach of the Taft-Hartley Act. Defendant seems unaware that Section 301 (a) by its terms specifically deals with 'Suits for violation of contracts between an employer and a labor organization' and that Congress provided that federal courts should have jurisdiction with respect to such contract breaches.

"The answer to defendant's position was given in *Reed v. Fawick Airflex Co.*, D.C. Ohio 1949, 86 F. Supp. 822, 823, 824. It was there said:

'If, however, a particular act is the subject of an agreement between employer and union and the union sues [under Sec. 301 (a)] for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only breach of contract but also an unfair labor practice.'

"That holding was cited with approval and followed in *Textile Workers Union of America v. Arista Mills Co.*, 4 Cir. 1951, 193 F. 2d 529, decided on other grounds. Moreover, as earlier stated, the Supreme Court succinctly ruled in Note 2 of its opinion in the *Westinghouse Electric Corp.* case that 'breach of contract is not an "unfair labor practice."'"

A recent opinion of the First Circuit in *United Electrical, etc., Local 259 v. Worthington Corporation*, 236 F. 2d 364 (C.A. 1, 1956) reaches the same result. In that case arbitration was sought for the discharge of two employees who refused to testify before a state un-American activities committee concerning Communist affiliation. For this performance they were discharged. The union filed a grievance which complained (1) that the company unfairly introduced new conditions of employment, and (2) that the employees were unjustly discharged under the contract. A majority of the Board of Arbitration ruled that the dispute was arbitrable and that the two discharges were not justified under the contract. When the company refused to comply with the award, the union brought suit under Section 301 to enforce the award. The District Court dismissed the complaint on the same ground as defendant urges here, namely, that exclusive jurisdiction over the dispute rested in the N.L.R.B., 136 F. Supp. 31. The Court of Appeals in an exhaustive opinion concluded that the exclusive jurisdiction of the Labor Board did not

apply to the discharge in violation of the contract. We quote 236 F. 2d at 370:

> "At the very least, the situation in the instant case consisted of a presentation by the Union of two issues for grievance processing and arbitration, or two grounds for charging that the same action of the Company was wrongful. One such issue or ground, the failure to consult the Union in advance, may be a question preempted to the jurisdiction of the N.L.R.B.; the other, the dismissal of two employees without just cause under the contract, clearly was not subject to N.L.R.B. jurisdiction. Certainly the preemption doctrine should not lift from the jurisdiction of other tribunals cases which the N.L.R.B. cannot lawfully decide (where there is no doubt that the case is outside the bounds of the Board's statutory jurisdiction)."
>
> * * *
>
> "Therefore we conclude that the arbitrators in the present controversy had jurisdiction over the allegation that the discharges were not for just cause under the contract, even though it be assumed for the moment that the Union was also presenting an allegation of refusal to bargain before imposing a new condition of employment, which later assertion may be a matter for exclusive cognizance by the N.L.R.B. The majority decision of the arbitrators in fact passed only upon the wrongful discharge aspect of the case and turned aside the refusal to bargain aspect . . ."

The opinion of the First Circuit comports with the prior decisions of the Fourth and Third Circuits. In addition, the First Circuit again made careful inspection of Board policy where the Board itself has declined to act on unfair labor practice charges where an arbitration award has been made or is available (236 F. 2d at 368).

Of real interest in this connection is the recent decision of the Board in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), 36 LRRM 1152.

In that case, the employer refused to a group of its striking employees reinstatement to their jobs. The record showed that as part of the settlement of the strike, the union and company agreed to arbitrate the question of whether four strikers whom the company did not wish to reinstate because of alleged strike misconduct, should be reinstated. Thereafter, the union ratified the strike settlement, and the arbitration was held. The arbitration panel ruled that the company was not obliged to reinstate these four employees. Thereafter, the employees filed a charge before the N.L.R.B.

The Trial Examiner of the N.L.R.B. found that the refusal to reinstate these four strikers violated the statute. He held that he was not bound by the arbitration award.

In reversing the Trial Examiner, the N.L.R.B. said:

> "We agree with the Trial Examiner that the Board is not bound, as a matter of law, by an arbitration award. As the Court said in the *Disney case*:
>
> 'Clearly agreements between private parties cannot restrict the jurisdiction of the Board. We believe the Board may exercise jurisdiction in any case of an unfair labor practice, when in its discretion its interference is necessary to protect the public rights defined in the Act.'
>
> "The Board has exercised its discretion in the past to remedy an unfair labor practice, even though the parties had used arbitration to dispose of an issue. In so doing, in the *Monsanto* case, the Board said:

"'There can be no jurisdiction for deeming ourselves bound as a policy matter, by an arbitration award which is at odds with the statutes. We shall therefore disregard the award in this case.'

"And in the *Wertheimer* case, the Board pointed out that where the arbitration had been carried out over the opposition of the individual involved, the circumstances were not such as to warrant the Board, in its exercise of its discretion, to decline to assert its jurisdiction.

"In the instant case, the factors which impelled the Board to exercise its jurisdiction in *Monsanto* and *Wertheimer* are not present. Thus, the arbitration award is not, as it was in *Monsanto*, at odds with the statute. This does not mean that the Board would necessarily decide the issue of the alleged strike misconduct, as the arbitration panel did. We do not pass upon that issue. . . . In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award. Accordingly, we find that the Respondent did not violate the Act when, in accordance with the award, it refused to reinstate the four strikers. . . ."

Thus, it is clear from this modern decision, that the Board, in its expertise, does not treat arbitration awards as totally pre-empted by Board processes, but in proper cases it actually follows arbitration awards in recognition of the public policy which favors this type of settlement of industrial controversy.

From the foregoing treatment of the problem, by the First, Third and Fourth Circuits, read with the present decision and with the decisions of the Board, we think that it can at least be said that the several Circuits and the Board are in harmony in this matter. All the opinions reflect a proper analysis of the role of the federal district courts in the enforcement of collective bargaining contracts. In each case, the possible application of the pre-emption doctrine has been thoughtfully considered. No difficulty in terms of conflict or confusion has yet arisen. Respondent respectfully submits that up to this point the way has proved clear.

Except for the present case, at the time of decision of all the above cited authorities, the *Lincoln Mills* opinion was not yet available. In two respects that opinion confirms the results previously reached and minimizes both legal and practical problems as regards this particular preemption argument. First, the Congressional policy decision to promote enforcement of arbitration awards in the federal courts has been recognized and settled. Second, the identification of the contract as one to be interpreted and enforced as a matter of federal law reflecting the policy of the statute, eliminates all theoretical conflicts and, we think, most potential practical conflicts. The function of the courts and the Board are now mutually complementary in keeping with one over-all scheme designed by Congress. By preserving freedom of choice and preventing unfair labor practices, the Board nurtures the contract. When the contract has been arrived at, the courts assure its performance, mindful of its statutory auspices and restrictions. Since no difficulty manifests itself, we submit there is no present occasion for the Supreme Court to disturb the orderly developments up to this point.

Counter-Point II.

The Court of Appeals decision on contract interpretation is correct. The strike settlement agreement is not the decisive document. There is no conflict with the decision of another Court of Appeals.

In its Point II, Petitioner argues that since the strike settlement agreement did not mention arbitration and since it referred to the return to work of strikers "lawfully entitled to reinstatement", there was no agreement to arbitrate. There being no such agreement, the claim is, a conflict exists with a decision of the First Circuit in *Local 149, etc. v. General Electric Company*, 250 F. 2d 922 (Petition, pp. 18-20).

The strike settlement agreement is actually a letter written by the Company and accepted by the Union (Tr. 12). The obvious explanation for the fact that the settlement memorandum does not mention procedures for arbitration is the fact that such procedures were already provided in the basic collective bargaining contract. The basic contract is mentioned in another part of the settlement memorandum (Tr. 11), so its existence was plainly contemplated by the parties. The phrase "strikers who were lawfully entitled to reinstatement", to which Petitioner attaches so much significance, occurs in a paragraph which obviously provides the mechanics and timing of the return to work of the employees who are going to return to work (Tr. 12). The document does not say that other employees will be subjected to the unilateral mercies of the Company, neither does it say that the existing rights under the basic labor agreement should be suspended or taken away from any person who was entitled to its protection.

As stated before, the basic contract which remains in effect for two years by its own literal language, contains grievance and arbitration procedures applicable to discharges, as well as related clauses covering the rights of discharged employees. The form and substance of the memorandum of settlement (a letter) does not support Petitioner's conclusion that it was intended to be a formal amendment of the contract. Indeed, it would violate the contract for the Company to insist upon settlement which would change the basic agreement by suspending the right to an arbitration trial for any discharged person. This would introduce extraneous issues into a dispute limited to wages. Therefore, it could not be lightly inferred either that the Company accomplished any impairment of the basic agreement by the settlement memorandum or that the Union would knowingly agree to such a result since the Union was at all times contractually protected against any demand by the Company to suspend or destroy contract language pertaining to arbitration of discharges. The Company would have no more right to demand that arbitration be suspended than the Union would have the right to demand an improvement in some other part of the contract on a subject other than wages. We submit that Petitioner's emphasis on the settlement memorandum is irrelevant to the contract interpretation which was correctly made by the Court of Appeals.

As to the claim that there is some conflict between this decision and the First Circuit Opinion in the *General Electric Company* case, the contracts were different as we demonstrate at p. 13 of this brief.

Counter-Point III.

There is no merit to Petitioner's claim that these discharges are not arbitrable because the issue of wages was not arbitrable. There is no conflict with any of the cited decisions as claimed by Petitioner.

We have already answered this point at p. 14 of this brief. This is simply a case where the parties contracted to retain in effect the entire contract with the exception of the one issue of wages, leaving the latter to bargaining and, if necessary, economic contest. Petitioner here is engaging merely in exercises in logic, proceeding from premises which the contracting parties did not adopt when they drafted their contract.

The various decisions cited at p. 22 of the Petition hold that where a union breaches a no-strike clause, it may not insist that the employer claim its damages solely through arbitration. They hold that the employer may sue directly to recover such damages.

There is no way that the present litigation affects that problem and it is a *non sequitur* for petitioner to argue that because wages are not arbitrable under this contract, or because a suit for the breach of the no-strike clause might be non-arbitrable, that it must also inexorably follow that discharges of strikers is non-arbitrable. It so happens that a clear and correct contract interpretation demonstrates that the parties did in fact draw the line at a place where Petitioner claims they could not logically do so.

Counter-Point IV.

The Court of Appeals should have reached the same result of reversing and remanding this case by holding that the question of arbitrability was for the arbitrators. This fourth question is tendered by Respondent and is intimately involved with all questions presented by Petitioners.

Again emphasizing that the writ of certiorari should be denied, Respondent calls attention to this fourth question.

The contract provides in Article IV (Contract, p. 4):

> "SECTION 2. Should any difference arise between the Company and any employee as to the meaning, application or interpretation of the provisions of this agreement, such difference may constitute a grievance and shall be settled as follows:"

There then follows a description of procedures to be followed in successive steps (Contract, pp. 4-5). The grievance goes forward:

> "If, in the opinion of a majority of the plant committee, a bona fide grievance does exist . . ." (Contract, p. 5.)

Article V, the arbitration clause, provides for the selection by agreement of a disinterested third person. If agreement cannot be reached, the third arbitrator is selected by request to the Federal Mediation and Conciliation Service for a list of five eligible arbitrators, who are pared down to one by a detailed selection process (Contract, p. 8).

The delegated powers of the Board of Arbitration is described thus (Contract, pp. 7-8):

> "SECTION 2. The Board of Arbitration shall render a decision within fifteen (15) days from the date the hearing is completed. The terms and conditions of settlement shall be within the sole discretion of the Board and the decision of a majority of the Board shall be final and binding on the parties; provided, however, the Board shall have no authority to violate, contravene, disregard or supplement the terms of this agreement."

The District Court held that these discharges are not arbitrable under the contract because the strikers were not "employees"—hence, there was no question of discharge, but only a question of employment or re-employment (see footnote 3, Appendix to Petition, p. 5). The enormity of this error is so apparent that discussion is unnecessary.

On appeal below, this Respondent as appellant urged as its first point that the District Court should have recognized that the final and binding decision concerning the meaning, application or interpretation of the contract was a matter for the Board of Arbitration. Respondent argued that by the plain meaning of words "any difference" as to the application of the contract means any disputes as to whether the contract, or any provision in it, applies to a given situation or problem. The same is true of the terms "meaning" and "interpretation." Respondent argued that it does not satisfy the bargain in

the contract to award plaintiff an answer to these broad questions in another forum. Well within the proper and lawful contemplation of the parties might have been a mutual desire to submit their disputes to persons of specialized experience in the labor relations field.

Respondent argued that in placing the final and binding decision within the sole discretion of the Board of Arbitration, the parties were providing a substitute for labor dispute, and not a substitute for litigation. Arbitration is widely developed, well reported and well understood in the industrial world, and accordingly it was fair to assume that the parties here consciously referred their contract disputes to a system and institution of established credibility and proven value.

Finally, it was argued that by its very nature, a collective bargaining contract is superimposed upon practices, habits, and ways of life of an industrial operation and much of its meaning must be derived from this background. In interpreting such a contract, due allowance must be made for past practice, past arbitration, arbitration precedents and other related matters. Accordingly, Respondent argued that the case here was plainly a "difference" between the parties within the meaning of the phrase and that the Court should rely upon the arbitrators to reject unmeritorious claims. Alternatively, Respondent argued, that if more is required, it is plain that the claim here advanced is not patently baseless or frivolous under the terms of the contract, but is maintained fairly and justly in view of the various contract clauses and the facts.

The Court of Appeals acknowledged that "there is much to say in favor of Appellant's argument" and referred to a substantial and respectable body of thought along the lines of Respondent's position (Appendix to Brief, p. 6; footnote 4). But the Court concluded that judicial authority has with practical unanimity held the question of arbitrability to be an issue for the courts. The Court deduced several "rules of construction" discernible from the case which it summarized thus (Appendix to Petition, p. 8):

> "We consider the general rule to be that a dispute between labor and management is arbitrable where the dispute is specifically contracted to be arbitrable or generally where the contract expresses a broad arbitration policy, i.e., a general arbitration clause; but controversies are not arbitrable where the controversy in question is specifically excluded, where because of a listing of many arbitrable incidences the instant controversy is impliedly excluded, and where the controversy or grievance concerns violation of a 'no strike clause'" (Footnotes omitted).

In so summarizing the rule, the Court also referred to the interpretation of collective bargaining contracts as a part of the "search for true tranquillity in the industrial world" (Appendix to Petition, p. 7), and to the fact that "private arbitration in the labor-management field is to be afforded broad liberalities" (Appendix to Petition, p. 14). As to the case at bar, the Court reasoned that not only are discharge grievances specifically covered, but the general provision "any difference" refers to a broad, inclusive coverage by the whole contract, including its preamble. Thus,

the case is arbitrable, the Court held, "in order to preserve the terms of the contract relating to seniority, retirement, etc., and to carry out its general intent and purposes". (Appendix to Petition, pp. 8-9).

Respondent acknowledges that the Court of Appeals, while anchoring itself to the principle that arbitrability is for the courts to decide, nevertheless declared a rule which is reasonably hospitable to private arbitration. We think that parties to collective bargaining contracts can live with such a declaration, at least pending further experience.

Respondent, however, still adheres to its position below that in the long run the better rule, consistent with the policies of the Act, is to leave arbitrability to the arbitrators where the language of the contract, as here, plainly says so in the literal words. The presumed expertise of the arbitrators applied to the practices and realities of the plant in question enables the negotiators of the contract to arrive at their bargain more easily. If federal courts, now placed astraddle of collective bargaining contracts by *Lincoln Mills*, commence a course of technical and narrow reading of these contracts, they will inevitably force the negotiators to become correspondingly more quarrelsome concerning technicalities of contract language, thereby damaging the collective bargaining process. For last year's comfortable language, clear enough to those who know the plant practice, may seem insufficient to the federal judge to leave anything to the arbitrators. It is for this reason that Respondent preserves the point.

Conclusion

Respondent respectfully submits that the Petition for Writ of Certiorari to review the judgment of the Court below should be denied.

Respectfully submitted,

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Certificate

Service on counsel for petitioner has been duly made in person on October 25, 1958 and has been properly certified to the clerk.